



**THLOPTHLOCCO TRIBAL TOWN**  
*Tribal Historic Preservation Office*

*Terry Clouthier, Tribal Historic Preservation Officer*

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November 8, 2017

THPO File Number: 2017-63

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Ex Parte Communication**

**Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-79**

**Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421**

**Replacement Utility Poles Report and Order**

Dear Ms. Dortch

The Thlopthlocco Tribal Town Tribal Historic Preservation Officer ("THPO" or "Tribe") expresses gratitude to the Chairman of the Federal Communications Commission (FCC), Ajit Pai, for circulating the Report and Order. The open dockets on this issue (WT 17-79 and WT 16-421) are considering and proposing changes to the FCC's administration of environmental and cultural resource laws and regulations. These are important decisions and rules that could be used as a detrimental precedent for historic preservation by this and other agencies.

The Tribe supports the telecommunication industry efforts to deploy broadband throughout the country and we hope that Indian country will benefit from these efforts. The Tribe also values preserving and protecting our places of cultural and religious significance and reaffirms the positive history of working with the FCC and industry in supporting both efforts with particular reference to the TCNS system in place at the FCC.

### **III. DISCUSSION**

#### ***A. Exclusion for Pole Replacements that Have No Potential to Affect Historic Properties***

*10. Pursuant to Section 800.3(a)(1) of the ACHP's rules, we conclude that in the circumstances specified below, replacement of a pole that was constructed with a sole or primary purpose other than supporting communications antennas with a pole that will support such antennas would have no potential to affect historic properties.*

Pursuant to:

- Section 101(d)(6)(B) of the National Historic Preservation Act (NHPA): In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A);
- 36CFR800.2(c)(2)(i)(A) of the NHPA's implementing regulations: For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands;
- 36CFR800.2(c)(2)(i)(B) of the NHPA's implementing regulations: Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO;
- 36CFR800.2(c)(2)(ii) of the NHPA's implementing regulations: Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.
- 36CFR800.2(c)(2)(ii)(A) of the NHPA's implementing regulations: The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith



effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

- 36CFR800.2(c)(2)(ii)(D) of the NHPA's implementing regulations: When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

#### Absence of Tribal Consultation:

At the outset, over the past year our tribe has been actively involved in the discussions and proposals to modify the FCC systems in place for your agency to comply with the NHPA by reading and submitting comments to FCC documents and actions being released and conducted without tribal consultation occurring beforehand. The Tribe maintains that the FCC has not conducted government to government consultation with Thlopthlocco Tribal Town as requested by Tribal leadership through multiple requests beginning in 2016. The THPO attended a meeting with the FCC in Washington D.C. on October 4<sup>th</sup>, 2017 and once again requested government to government consultation and received no response by anyone in attendance at the meeting and has received no reply since that meeting. The Tribe considers these meetings to be informational only and not government to government consultation which requires consultation with Tribal leadership and the Business Committee. The THPO is submitting these comments as an Ex-Parte communication because, unfortunately, there has been no other response by the FCC to our requests to conduct government to government consultation regarding these pressing issues.

The Tribe also maintains that the FCC, and the action of invoking section 36CFR800.3(a)(1) of the NHPA, has not conducted tribal consultation with our representatives pursuant to the sections referenced above and is requesting that the FCC address this serious lack of government-to-government protocol and requirement. Distributing the referenced report and order also forecloses Tribal involvement and consultation as required by the Section 106 process. Of particular importance to this statement are the consultation requirements of 36CFR800.2(c)(2)(ii)(A) relating to the Tribe's articulation of its views on the undertakings potential effects to historic properties which would include the blanket decision that the proposed undertakings do not have any potential to affect historic properties and are thereby excluded from Section 106 review. We disagree with this assertion as will be further explained in this document.



### Lack of Data and Information to Support FCC Claims:

The Tribe requests copies of all data and information that supports the FCC's determination that the activities covered by the proposed report and order will not affect historic properties which justified invoking 36CFR800.3 (a) (1) to exclude these activities from review. To date the THPO is not aware of any such data existing or even being collected by the FCC and by law, an agency cannot arbitrarily decide to exclude certain types of activities without substantive demonstration and proof nor can it make decisions which are arbitrary and capricious per the Administrative Procedure Act. The THPO knows of many circumstances where these activities have and will affect historic properties if the proposed exclusions were to go into effect.

Additionally, how is the FCC determining that properties of traditional religious and cultural significance are not being affected by the proposed undertakings covered by this report and order which requires consultation per Section 101 (d) (6) (B) of the NHPA and 36CFR800.2 (c) (2) (ii) (D) of its implementing regulations? The THPO is unaware of any agreement or information provided to the FCC which delegates Tribal authority to the FCC to make decisions on behalf of Thlophlocco Tribal Town as it relates to the identification, interpretation or potential effects to our sites of traditional religious and cultural significance. The one good thing that the FCC does have in relation to this paragraph is the Tower Construction Notification System (TCNS). One of the primary functions of the TCNS is to allow Tribes to define their areas of interest in relation to potential effects to historic properties, including but not limited to, properties of traditional religious and cultural significance and the TCNS informs the Tribe when an undertaking is taking place in one of those areas. The Tribe then reviews the proposed undertaking and responds with their concerns based on their knowledge of sites and areas of concern within the area of potential effects. However, with this proposed report and order, the specialized expertise relating to the knowledge, interpretation and locations of sites of significance to Tribes and other sites and site types not available in state records or by anyone at the FCC or its applicants is being ignored even though it is a requirement that the Federal Agency consult with Tribes on these issues in the Section 106 process per Section 101 (d) (6) (B) of the NHPA and 36CFR800.2 (c) (2) (ii) (D) of its implementing regulations and that the Tribes possess specialized expertise in assessing the eligibility of historic sites of significance per 36CFR800.4 (c) (1).

Most right of ways (ROW) were created prior to the enactment of the NHPA. Additionally, most ROW were also created prior to the 1992 amendments of the NHPA requiring consultation with Tribes and were also created prior to Presidential orders that Indian tribes must be consulted on issues that affect them (i.e. Executive Order 13175). Therefore these ROW have rarely, if ever, been surveyed for Tribal historic properties.

Likewise, previously disturbed ground rarely, if ever, included Tribal survey or input on the activity that originally disturbed the land therefore the assertions that such land has no potential

to affect tribal historic properties cannot be made with any certainty as is stated repeatedly within the report and order.

Paragraph 10:

*(i) The original structure—*

*(A) Is a pole that can hold utility, communications, or related transmission lines;*

*(B) Was not originally erected for the sole or primary purpose of supporting antennas that operate pursuant to a spectrum license or authorization issued by the Commission; and*

*(C) Is not itself a historic property.*

Was the location of the original pole subject to Section 106 review? This is critical for the FCC to understand and discuss as it sets in motion a dangerous precedent that can be used by other Federal agencies to replace other structures in a similar fashion to this report and order and thereby bypass the Section 106 process. The FCC consistently refers to the 2017 Advisory Council on Historic Preservation (ACHP) Federal Lands Program Comment throughout this report and order as justification for comments, directives and statements contained within it. Therefore, it is not unreasonable to assume that other Federal agencies will do the same regarding replacement of their facilities, regardless of whether the facility is Section 106 compliant or not, by referencing this document.

How is the applicant to know if a pole is an historic property if they are not required to consult under Section 106 on undertakings which are pole replacements under this report and order? Currently, the applicant would need to consult with the State Historic Preservation Office (SHPO) and Tribes to determine if the pole or property is an historic property. Is the FCC planning on documenting every historic pole location throughout the country, updating it every year and subsequently providing that information to their applicants to somehow ensure that historic properties in the form of poles are not, in fact, being affected by the proposed undertaking as this report and order claims? As the report and order is currently written and with the laws currently in place there is simply no way that an applicant can find out if a pole is an historic property without consulting under Section 106 therefore there is no way feasible means to accomplish the very first section of this report and order.

Paragraph 10:

*(ii) The replacement pole—*

*(A) Is located within the same hole as the original pole;*



The report and order repeatedly claims that replacing utility poles will not harm any historic properties throughout the document. However, the THPO finds this to be a baseless statement. The THPO is unaware of any data existing or collected by the FCC to make such an assumption. Once again, the THPO reminds the FCC that it cannot arbitrarily decide to exclude certain types of activities without substantive demonstration and proof that it will not harm historic properties nor can it make decisions which are arbitrary and capricious per the Administrative Procedure Act. The THPO is of the opinion that replacing a pole in the same hole is not harmless because the hole will always be deeper and larger for a replacement pole which can be up to 10% larger than the existing pole and will also carry additional weight due to antennas and other infrastructure placed upon it which invariably will harm any historic properties present.

Additionally, how will the FCC address the poles which were constructed in the last year without any Federal oversight in terms of Section 106 as part of a "trail period" to not conduct any compliance with Tribal, federal, state and local laws by the industry? Will replacement of these poles be accepted by the FCC even though they were constructed in violation of Tribal, federal, state and local laws? The THPO maintains that these poles must be subjected to Section 106 and other federal, state and local law review as was required when they were illegally constructed, apparently, with the express intention to be used for 5G deployment based upon approval of the "trail period" by the industry itself with no guidance from the FCC.

Will the FCC be monitoring the applicants and construction activities to ensure that this rule is being followed? Given that there are numerous examples of companies within this industry flagrantly disregarding laws related to construction of poles in right of ways within the last year, the THPO is more than a little concerned that this proposed report and order will just allow them to continue disregarding the laws including the stipulations outlined within this proposed report and order. It can easily be seen that this report and order and the exemptions provided within it will do nothing but embolden the players within the industry who have disregarded laws in the past to just continue to do so as the FCC has provided no guidance or monitoring to ensure that the provisions contained within the report and order are adhered to. Additionally, the FCC is neglecting to take into consideration that the removal of the pole itself is not the only action which could affect cultural resources within this report and order relating to replacement of poles. Trucks moving into the area and laydown areas for the pole as it is segmented or removed in whole are both examples of activities which have the potential to impact historic properties relating to the removal of a single pole yet, Tribal and SHPO information relating to sites either directly at or adjacent to the location will not be considered and apparently the FCC does not consider this as a foreseeable effect which could impact historic properties even though they obviously are by excluding pole replacements from historic preservation review.

No consideration is given within the proposed report and order to the fact that, in some cases, the poles were placed within an existing historic property, including historic properties of traditional religious and cultural significance to Tribes. In these situations, where feasible, it would have been recommended, through section 106 consultation, to move the pole from that location to one that does not impact an historic property which contravenes, and would be a preferable alternative to, the following statement in paragraph 14:

*"We also expect that creating an additional exclusion for pole replacements will encourage providers to replace existing poles in previously disturbed areas rather than undertaking new construction activity that potentially could affect historic properties."*

The THPO agrees that using existing infrastructure is a preferable alternative to newly constructed poles and towers however, the THPO does not want poles replaced within the boundaries of historic properties. Section 106 consultation allows us to situate the proposed undertakings within our Tribal databases to determine if it will impact an historic property and if so, to hopefully remove it and restore the historic property to a more natural setting. The proposed report and order would prevent the Tribes and SHPO from recommending a more suitable location for these poles which were originally placed within the boundaries of an historic property likely without any section 106 review. Apparently, the FCC does not see the removal of poles within the boundaries of an historic property as beneficial to the resource and instead focusses only on the disturbed nature of the pole location itself to justify their exclusion from historic preservation requirements.

Paragraph 10:

*(B) Has a height that does not exceed the height of the original pole by more than 10 percent of the height of the original pole; and*

Same comments as above for (A) under this subpart of the report and order. The THPO is also concerned that this could potentially be abused by replacing the poles and incrementally increasing the height of a pole location by 10% each time it is replaced. Some consideration and language must be added to the report and order to prevent this abuse which will affect historic properties in an area without any oversight or monitoring being able to be conducted due to this exemption.

*(C) Has an appearance consistent with the quality and appearance of the original pole.*

Same comments as above for (A) under this subpart of the report and order.

*(iii) Construction of the replacement pole in place of the original pole entails no new ground disturbance (either laterally or in depth) outside previously disturbed areas,*



*including disturbance associated with temporary support of utility, communications, or related transmission lines. For purposes of this paragraph, "ground disturbance" means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of previously undisturbed soils.*

Same comments as above for (A) under this subpart of the report and order. Additionally, who is determining that the soils are previously disturbed or undisturbed? Is the FCC really expecting the industry to monitor itself? Given that this is an industry which has, by its own actions and "trial periods", disregarded laws already; the THPO has no faith that the industry will monitor for disturbed versus undisturbed soils when placing their replacement poles and could be adversely affecting historic properties as will be outlined further in this document.

There is no procedure or oversight established within the FCC report and order to address this self-monitoring which the FCC is allowing the industry to conduct. Relying on a general rule of observe the infraction than report it which seems to be implied by this report and order is irresponsible at best and potentially criminal at worst. There will be thousands of "pole replacements" proposed by the industry once this report and order goes into effect as they basically have free reign to do what they please with little to no oversight by the FCC or other agencies. Numerous pole replacement projects are currently being abandoned through TCSN as of this date in anticipation of approval of this report and order so that they can be refiled without historic preservation guidance and requirements. The FCC apparently believes that allowing the industry to self-regulate and monitor is a good thing when all the industry apparently is doing is looking out for themselves and their bottom dollar with no consideration given at all to historic preservation issues or Tribal, local, state and federal laws. It is becoming increasingly apparent that all of the industries actions and comments thus far have been apparently aimed precisely at circumventing these rules and regulations and now, they apparently have the full support of the federal agency behind them under the guise of the proposed report and order and whatever subsequent steps are taken in regard to additional steps to streamline historic preservation as commented in paragraph 16

*"This Order is an initial step in our broader effort to streamline historic preservation review requirements in this proceeding."*

Red Mountain Cemetery was located in Birmingham, Alabama. The cemetery was used between 1888 and 1905 and over 4000 individuals were buried there within an area encompassing ½ of a square mile. Prior to the enactment of the NHPA, this cemetery was converted into a zoo and botanical garden and to the THPO's knowledge it never received a site number by the SHPO even though it is well known that the cemetery existed and that bodies have, on more than one occasion, been dug up within the boundaries of the original cemetery. Portions of this cemetery are now located within the ROW of four different roads including



Highways 280 and 34, numerous businesses and homes, the zoo and botanical garden and all of their associated ROW for utilities, transportation and communications. Part of our comments as it relates to Section 106 consultation would be to advise monitoring at this location to ensure that deposits relating to the cemetery are not disturbed, however, with the proposed report and order, the SHPO and the Tribes are unable to provide these comments and therefore proposed undertakings at this location which have no guidance for monitoring now have a far greater potential to disturb human remains which may or may not be reported to the FCC and state authorities.

Citico Mound in Chattanooga, Tennessee was a large mound site located along the Tennessee River which was destroyed during construction of Riverside Drive. This site was second in size to Etowah at the time of DeSoto's expedition in 1540. At least 188 remains have been recovered from this mound complex and it is likely that many more exist under the road and within the ROW to this day. Additionally, multiple land and water routes relating to the Trail of Tears are located within Chattanooga, TN, therefore, this entire area contains many important areas to Tribes which could be impacted by deployment of infrastructure. The proposed report and order would not allow Tribes or SHPO the opportunity to provide guidance as it relates to pole replacement in any of these areas and therefore no one would ever know if historic properties were actually affected contrary to the statements in the report and order that the action of pole replacements will not affect historic resources.

In both of these situations, and there are many others just like them, the report and order fails to address any process for inadvertent discoveries or findings of human remains related to the replacement of these poles. Apparently, the FCC is content with relying on the industry to report inadvertent discoveries and human remains to them or to the State authorities. However, as the THPO has mentioned consistently through this document, the industry is not to be relied upon for any actions which require compliance with laws when their entire motivation and actions are apparently motivated by circumvention of the laws in pursuit of cheaper and rapid deployment of infrastructure in order to gain a profit. The applicants and construction crews are operating under the guidance and rules of the FCC in that no historic preservation review is necessary for pole replacement, therefore, the FCC is the responsible party when damages occur during those actions.

This report and order also fails to address replacing poles on Tribal lands.

36CFR800.2(c) (2) (ii) (B) of the implementing regulation states: The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal

sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

How will replacement of poles on Tribal Lands be addressed through this report and order when the Tribe requires archaeological surveys and consultation for all ground disturbing activities consistent with Section 106 within their own laws on all Tribal lands? Will the FCC try and enforce this report and order upon a sovereign nation? How will the Tribes be notified that the pole replacement is even happening if there is no historic preservation review required by the applicant? How will the applicants know they are on Tribal lands? The deployment of 5G technology, which is the impetus for this docket, apparently won't actually be occurring on Tribal lands anyway but the questions need to be raised on the off chance that the industry decides there is profit to be made there and in other rural communities.

Please feel free to contact the THPO at [thpo@tttown.org](mailto:thpo@tttown.org) or (918) 560-6113 if you have any questions or comments.

Please refer to THPO file number 2017-63 in all correspondence for this undertaking.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Terry Clouthier', with a long horizontal flourish extending to the right.

Terry Clouthier  
Thlopthlocco Tribal Town  
Tribal Historic Preservation Officer